CDK Contracting Company, a subsidiary of FK Group, Inc. *and* Sheetmetal Workers' International Association, Local Union No. 16 AFL–CIO. Case 36–CA–6694

September 30, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On March 25, 1992, Administrative Law Judge Timothy D. Nelson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[1]

The judge found, and we agree essentially for the reasons set forth by the judge, that the Respondent violated Section 8(a)(1) by denying access to the jobsite to union officials seeking to communicate with employees of subcontractor MacDonald-Miller, Inc., who were represented by the Union.

In its exceptions, the Respondent primarily contends that the principles set forth by the Supreme Court in *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841 (1992), control this case. According to the Respondent, *Lechmere* dictates that the complaint allegations must be dismissed. For the reasons that follow, we disagree.

In *Lechmere*, the Court denied private property access to nonemployee union agents who sought access for the purpose of communicating an organizational message to employees. Here, substantially different issues and considerations are before us. At issue here is whether a general contractor may deny access to a jobsite to union officials who seek to communicate with employees of a subcontractor represented by the union where a visitation clause in the contract between the subcontractor and the union permits access. As the judge reasoned, the Respondent, by soliciting other employers to perform work at the jobsite, ''invited'' subcontractors, and their respective subcontractors, onto the jobsite, and thus subjected its ''property rights'' to the Union's contractual ''access'' rights with those subcontractors.[2] Thus, the Respondent here, unlike the respondent in *Lechmere*, voluntarily undertook to have work performed by unionized subcontractors on the property. In these circumstances, the Respondent was not privileged to interfere with the contractual obligations of the subcontractors and the contractual rights of the unions that represented subcontractor employees. We conclude that the Respondent must permit those contractors to observe their contractual obligations.

Further, the Union did not have a reasonable, effective alternative means to enforce its contractual rights and communicate with represented employees. Its visitation clause[3] contemplates visitation at the jobsite, and we infer that it was negotiated because visitation was deemed necessary to ensure contract compliance. The Board has consistently held that ''access is necessary in order to investigate and to resolve contract compliance when the contract grants the union such access.'' *C. E. Wylie Construction Co.*, supra at 1051. See also *Villa Avila*, 253 NLRB 76, 81 (1980), enfd. as modified 673 F.2d 281 (9th Cir. 1982).

In light of the above considerations that differ in critical respects from those present in *Lechmere*, we find that *Lechmere* does not mandate dismissal of the complaint in this case.

[1] The Respondent has excepted, inter alia, to portions of the judge's recommended remedy. Specifically, the Respondent excepts to the judge's failure to permit it to promulgate reasonable rules applicable to visits to the jobsite by both union business agents and other visitors. We find merit in the exceptions and shall modify the Order accordingly. Based on the violation found, the Respondent shall be ordered to cease and desist from imposing unreasonable or discriminatory rules relating to access. See *C. E. Wylie Construction Co.*, 295 NLRB 1050 (1989), enfd. as modified 934 F.2d 235 (9th Cir. 1991). Contrary to the judge, we shall not at this point limit the Respondent to those rules that were in effect on October 15, 1991, the date on which it first denied access to union officials. We also shall not preclude the Respondent from including an escort requirement in those rules, so long as the requirement is reasonable and nondiscriminatory.

The Respondent also excepts, inter alia, to the judge's requirement that it send copies of the Notice to Employees to DeaMore Associates, Inc. and McBride Sheet Metal, Inc., for posting. We find merit in this exception. The issue in this case was whether the Respondent unlawfully denied access to the union officials seeking to communicate with the employees of MacDonald-Miller, who were represented by the Union. There is no evidence that the Union sought to visit the employees of these other two subcontractors, or that their employees were working on the construction site when the Union was denied access on October 15 and November 20. Accordingly, we have modified the Order.

[2] The judge found it significant, and we agree, that the Respondent's own subcontracting agreements required its subcontractors to assure ''harmonious labor relations'' and to ''fully abide by all labor agreements.'' Although this agreement did not explicitly apply to the subcontractors of the Respondent's subcontractors, it is apparent, as the judge found, that the purpose of the agreements was to foster labor peace on the jobsite. Obviously, a breach of any labor agreement on the site would disturb labor peace. Thus, it was implicit in the subcontracting agreements that all labor agreements should be honored.

[3] The clause states as follows:

> VISITATIONS: Authorized business representatives and the Trade Coordinator shall have access to shops and jobs where members of the Union are at work, it being understood that they will first make their presence known to the management and that they will not unnecessarily interfere with the employees or cause them to neglect their work.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, CDK Contracting Company, a subsidiary of FK Group, Inc., Vancouver, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

''(a) On the Union's request, permit it to enter the VA Project jobsite to communicate with the employees of MacDonald-Miller that it currently represents; provided, however, that nothing herein shall be construed as preventing the Respondent from applying reasonable and nondiscriminatory rules pertaining to nonemployee access.''

2. Substitute the following for paragraph 2(c).

''(c) Sign and return to the Regional Director sufficient copies of the notice for posting by MacDonald-Miller, Inc., at places where notices to employees are customarily posted.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse or otherwise interfere with the Union's right to enter the VA Project jobsite for the purpose of communicating with employees represented by the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act.

WE WILL, on the Union's request, permit it to enter the VA Project jobsite for the purposes of communicating with the employees of MacDonald-Miller, Inc., which it currently represents.

CDK CONTRACTING COMPANY, A SUBSIDIARY OF FK GROUP, INC.

Linda J. Scheldrup, Esq., for the General Counsel.
James S. Cheslock, Esq., of San Antonio, Texas, for the Respondent CDK Contracting Company.
Milton Hill, Business Manager and Secretary-Treasurer, for the Charging Party Sheet Metal Workers Local 16.

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge. I heard this case in trial in Portland, Oregon, on January 9, 1992, based on a complaint and notice of hearing issued by the Regional Director for Region 19 of the National Labor Relations Board on December 9, 1991,[1] following his investigation of an unfair labor practice charge filed by Sheet Metal Workers Local 16 (the Union) on October 25. The Regional Director issued narrowing amendments to the complaint on December 17. In substance, the narrowed complaint alleges that CDK Contracting Company (the Respondent), as the general contractor on a certain Veterans Administration hospital project, violated Section 8(a)(1) of the Act when, on October 15, and again on November 20, it denied jobsite access to an agent of the Union who was seeking to make onsite contacts with employees who were represented by the Union and employed by a subcontractor who was bound to labor agreements containing ''visitation'' provisions.[2]

The Respondent's answer admits that it is an ''employer'' whose operations are ''in commerce'' within the meaning of Section 2(2), (6), and (7) of the Act, and whose relevant direct or indirect business transactions satisfy the Board's ''discretionary'' standards for the assertion of jurisdiction, and that the Board's jurisdiction over this controversy is therefore properly invoked. On the merits, it admits in substance that its agents denied jobsite access to the Union's agent, John Snyder, on October 15 and November 20, but it denies wrongdoing in all the circumstances.

I have studied the whole record, including the parties' posttrial briefs; I have considered as well the demeanor of the witnesses as they testified, and I have assessed the probabilities inhering in the undisputed circumstances. Based on all of that, and more particularly on the findings and reasoning below, I will conclude that the Respondent violated Section 8(a)(1) substantially as alleged in the complaint.

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[1] All dates are in 1991 unless I specify otherwise.

[2] The amended complaint more precisely alleges that on one of the two dates in question—October 15—the Respondent unlawfully denied access not only to an agent of the (Charging Party) Union, but also to representatives of ''other unions representing employees on the jobsite.'' However, as I explain elsewhere below, the record contains no substantial support for the claim that the Respondent's actions vis-a-vis said ''other unions'' was unlawful. Indeed, the General Counsel does not specifically argue the merits of the ''other unions'' claim. In all the circumstances, therefore, I will decide only whether the Respondent violated Sec. 8(a)(1) by denying access to the (Charging Party) Union.

FINDINGS OF FACT

I. THE GENERAL COUNSEL'S PRIMA FACIE CASE

A. *The Parties; the Respondent's and Subcontractors' Roles; and Relevant Labor Relationships and Contract Provisions*

The Respondent is an Arizona corporation, engaged by the Veterans Administration to be the general contractor responsible for construction of additions to a VA hospital complex in Vancouver, Washington (the VA Project), located across the Columbia River from Portland, Oregon. The Respondent began work on the VA Project on August 20, 1990. Under its VA contract, the Respondent is responsible for control over and access to the jobsite, which comprises roughly 70,000 square feet of U.S. Government-owned land. Consistent with that ''steward/guardian'' function, the Respondent has placed a perimeter fence around that site.

The Union is headquartered in Portland, and its International body has conferred ''jurisdiction'' on the Union over a territory which includes the VA Project site.

The Respondent has let subcontracts to various specialty contractors, including to Total Mechanical, Inc. (Total), the company which is chiefly responsible for all mechanical systems, including piping and ductwork. Total has in turn subcontracted certain ductwork to MacDonald-Miller, Inc. (MacDonald). Throughout the October 15-November 20 period in which the instant controversy arose, MacDonald had sheet metal employees working on the site, and (by virtue of provisions in a labor agreement between the Union's sister Local 66 and a contractor's association which included MacDonald, quoted below) the ''working conditions'' of these employees are largely governed by a ''local Agreement'' administered by the Union which contained ''visitation'' language. The Respondent has also contracted certain work requiring sheet metal employees directly to subcontractors other than MacDonald—namely, McBride Sheet Metal, Inc. (McBride) and DeaMore Associates, Inc. (DeaMore)—but it was only MacDonald's employees to whom the Union was seeking access on October 15 and November 20, as I detail in the next section.[3] Accordingly, this case does not present a ''live'' case or controversy involving the Union and any possible rights of access to McBride's or DeaMore's employees.

The Respondent and Total have no direct labor relationship nor agreement with any unions. However, MacDonald (and McBride and DeaMore) are bound to ''local Agreements'' with the Union or with one of its sister locals, negotiated by local ''Chapters'' of a national multiemployer group of sheet metal contractors known by the acronym, ''SMACNA.'' MacDonald, Total's subcontractor, is bound to an agreement (G.C. Exh. 6) negotiated between the Union's Seattle, Washington sister Local (Local 66) and the ''Western Washington Chapter'' of SMACNA (Western Washington SMACNA). That agreement contains ''visitation'' language[4] which is materially similar to the language quoted later below, but addresses itself chiefly to work performed by signatory contractors within Local 66's ''Western Washington'' jurisdiction. It also provides, however (added emphasis):

> *When the Employer has any work . . . outside of the area covered by this Agreement and within the area covered by another Agreement with another union affiliated with the Sheet Metal Workers International Association* . . . [a]ll [but two] . . . sheet metal workers shall come from the area in which the work is to be performed[,] [and] . . . shall be paid . . . no . . . less than the established wage scale of the local Agreement covering the territory in which such work is performed . . . and *the Employer shall be otherwise governed by the established working conditions of that local Agreement.*

In the case of work at the VA Project, as all parties agree, the governing ''local Agreement'' is the one negotiated between the Union and the ''Columbia Chapter'' of SMACNA (Columbia SMACNA). That agreement (G.C. Exh. 2) contains a ''visitation'' provision, as follows:

> VISITATIONS: Authorized business representatives and the Trade Coordinator shall have access to shops and jobs where members of the Union are at work, it being understood that they will first make their presence known to the management and that they will not unnecessarily interfere with the employees or cause them to neglect their work.

The Respondent does not dispute, and I find in any case, that, as a consequence of the first above-quoted language in the Western Washington SMACNA contract, MacDonald was bound while on the VA Project to observe the above-quoted visitation provisions in the governing ''local Agreement,'' that is, the Columbia SMACNA agreement.

The Respondent's own interest in peaceful labor relationships and observance of labor agreements by its subcontractors is plainly evidenced by a provision in its subcontracting agreements with Total (duplicated in its subcontracts with McBride and DeaMore), as follows:

> 11.17 The Subcontractor shall do whatever is necessary in the prosecution of its work to assure harmonious labor relations at the Project and to prevent strikes or other labor disputes. The Subcontractor shall fully abide by all labor agreements and jurisdictional decisions presently in force or subsequently executed with or by the Subcontractor. The Subcontractor's failure to so act may be deemed a material breach of this Contract.

[3] The Respondent has contracted directly with McBride to install sheet metal associated with roofing and gutters. Although the record is not clear, it appears that McBride (itself a party to the ''Columbia SMACNA'' agreement with the Union described below) employed sheet metal employees on an intermittent basis on the site during parts of the same October 15-November 20 period. (Thus, the Respondent's project manager, Ralph Thorpe, testified with certainty that none of McBride's employees was onsite on October 15, but he was uncertain whether any were onsite on November 20.) In addition, the Respondent has contracted directly with DeaMore to perform installation of an aluminum and glass ''storefront'' facing. Although the record discloses that DeaMore, like McBride, is itself bound to the Columbia SMACNA agreement, DeaMore had not performed any work on the site at times relevant to this case, but was due to begin such work in February or March 1992.

[4] See G.C. Exh. 6, art. XIV.

B. *Denial of Jobsite Access on October 15 and November 20*

My findings about the immediate background to the key events described in this section are based on the undisputed testimony of Union Business Representative John Snyder.[5] My findings about the key events themselves require reference both to Snyder's testimony and to that of the Respondent's project manager Ralph Thorpe, whose perspective from within the VA Project site was obviously different from that of Snyder, standing on the outside. I found each of these witnesses to be apparently candid in describing facts, and in the end I do not detect any serious lack of harmony in their factual accounts.

Immediate Background

On October 11, Don Perman, the Union's ''Trade Coordinator,'' gave the Union's business representative, John Snyder, a typed letter containing eight signatures, most of which Snyder recognized as signatures of members of the Union then working for MacDonald, including Perman's son, Jack.[6] The letter stated in material part:

> We . . . request that we be represented by a Sheet Metal Workers Local #16 Business Agent on the [VA] construction site . . . .
>
> Please attend to this matter as soon as possible due to the many issues that need to be disgust [sic] with him on this job site.

On October 14, Snyder called MacDonald's foreman, Chet Ward, and told him he planned to visit the VA Project the next morning. Ward said that he would notify someone from Total about this, who would, in turn, notify the Respondent. In fact, Project Manager Thorpe candidly acknowledged that he received such notice on the late afternoon of October 14, in the form of a copy of a note from Ward, passed on to him by someone from Total. He recalled that the note mentioned not only Snyder's name, but the names of two other agents of the Union as the intended visitors. Finally, Thorpe acknowledged:

> Early in the morning of the 15th I contacted Total Mechanical . . . and advised them that these union officials would not be allowed access to the jobsite.

On the morning of October 15, Snyder first attended a meeting of the ''safety committee'' of the Columbia Pacific Building Trades Council. According to Snyder, that committee, composed of representatives from various trades, periodically selects one or more area construction jobs to visit, to ''make sure that the job is safe for our people.'' Snyder informed the committee that he was already planning to visit the VA Project that morning, and suggested that the whole committee go with him. Upon arrival at the site at about 11 a.m., the nine building trades representatives, including Snyder, conferred briefly and decided to approach the perimeter gate in groups of two or three. The first such group, composed of representatives from the ''UA'' (''pipefitters'') and the Laborers' union, conferred with the security guard at the gate (the Respondent employed the security service) and were allowed to enter.[7] About 10 minutes later, Snyder and two representatives of other unions (Bricklayers Agent John Mohlis, and Painters Agent John Kirkpatrick) likewise approached the gate. Snyder identified himself to the guard and told him he wanted to enter to ''see my members that are working for MacDonald-Miller.'' The guard replied that he would have to ''call . . . in.'' Snyder then listened to the guard's two-way radio transmission with a ''female on the other end'' who ''said she would check and get right back with him.'' About 3 minutes later, Snyder heard the ''female'' radio back to the guard with instructions that Snyder should wait outside, and that a representative from MacDonald would be sent out to talk to him.[8] Later, Job Foreman Ward from MacDonald came out and conferred with Snyder for a few minutes, during which he told Snyder that

[5] Other, more remote ''background'' was offered by the Respondent's Project Manager, Ralph Thorpe, concerning alleged ''neutral gate'' picketing many months earlier, and other forms of alleged ''harassment'' of the Respondent by a variety of building trades unions. I will reserve discussion of this more remote ''background'' to my analysis of the Respondent's defenses to the complaint.

[6] Snyder had been involved with furnishing sheet metal workers to MacDonald since it began working on the VA Project as Total's subcontractor. His first dispatch to MacDonald, in February, was a traveling member of Seattle sister Local 66, Chet Ward, who became MacDonald's ''job foreman.'' Thereafter, he dispatched other members of the Union to MacDonald, as need arose.

[7] Not long after this, Thorpe discovered their presence on the site and instructed Total's superintendent to ask them to leave. From the gate guard's ''Visitor's Log,'' Thorpe infers that the guard admitted them only because they had misrepresented themselves as being associated with Total. The log book is facially inadmissible hearsay, although Thorpe arguably offered enough foundation to authenticate it as a ''record of regularly conducted activity,'' an exception to the hearsay rule under *Fed. R. Evid*., Rule 803(6). In any case, as I noted at the outset, despite a complaint count averring that the Respondent violated Sec. 8(a)(1) by denying jobsite access to ''other unions'' besides the Charging Party Union, the facts pertinent to the possible statutory access rights of the ''UA'' and ''Laborers''' representatives were not adequately litigated. (Thus, for example, there is no evidence that any employees represented by the ''UA'' or the ''Laborers'' were working on the VA Project on October 15.) Accordingly, and inasmuch as I intend to determine only whether the Respondent's denial of access to the (Charging Party) Union violated Sec. 8(a)(1), it is irrelevant how it was that the UA and Laborers' representatives may have initially been passed through the guard gate.

[8] Thorpe, explaining the same events from his perspective inside the site, admits that he was informed that ''there were a large number of union officials at the . . . gate requesting permission . . . as I was informed, three people from the Sheet Metals Local, [*] the two pipefitters people plus a carpenters rep and a carpenter . . . .'' Thorpe further admits that he instructed that the union agents not be allowed to enter, but that, instead, a representative from each of the subcontractors on the site would be sent to the gate to confer with the union officials for each of the involved trades.

[*] The gate guard's ''Visitor's Log'' indicate that the guard recorded not only Snyder, but also Mohlis and Kirkpatrick as ''Sheet Metal Union'' agents. Snyder's testimony is silent concerning what Mohlis or Kirkpatrick may have told the guard before the guard made the entries in question. I do not find the entries relevant to ultimate issues, even if admissible as a hearsay exception concerning what the latter agents may have told the guard. Again, the only fully-litigated question (and the only one the General Counsel has pursued in any case) is whether the Respondent was entitled to deny access to the Union on October 15 and, later, on November 20.

he had ''four or five'' other sheet metal workers working that day. Apparently, from Thorpe's admissions, all other waiting union representatives from the building trades safety committee were likewise denied entry to the site, but again, there is no evidence that any employees represented by any of those trades were then working on the site.

On November 20, Snyder again visited the site, alone this time, and presented himself to the gate guard, saying he would like ''to go in and see the employees of MacDonald-Miller.'' The guard again conferred via two-way radio, this time with a man, who refused Snyder's access request, but said that he would again arrange for Chet Ward to come outside to talk to Snyder.[9] Ward came out soon after this, and chatted briefly with Snyder.

The General Counsel sought to litigate yet a third (postcomplaint) incident during which Snyder again sought access to the VA Project site, but this was interrupted by the Respondent's acknowledgment through counsel that it has at all times since November 20 continued to refuse to deny access to the VA Project site to the Union. I therefore ruled that any such evidence of ''continuing'' refusals would be cumulative, and the General Counsel acquiesced.

II. ANALYSIS; CONCLUSIONS OF LAW

A. *Introduction; Legal Setting*

This is a case alleging an 8(a)(1) violation. Section 8(a)(1) of the Act makes it unlawful for an employer to ''interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.'' Section 7 of the Act states in pertinent part, ''Employees shall have the right to form, join, or assist labor organizations, and to engage in collective bargaining with their employer through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection . . . .''

Personal contact with a union representative is typically essential to, and an integral part of, employees' exercise of Section 7 rights. And, as all parties recognize, the exercise of this right is inevitably ''interfered with,'' whenever an employer prevents such union-employee contacts from taking place. But, as the parties also recognize, when a nonemployee union agent seeks access to employees working on property owned by another, the employees' Section 7 rights of ''contact'' with the union agent will conflict with the owner's right to control its property if the owner (or, as here, the owner's surrogate) does not want to admit the union agent onto the property. Such a conflict is obviously presented in this case.[10]

Under a traditional analysis, the Board seeks to resolve conflicts between Section 7 rights of employees and property rights of employers or other parties by reference to the ''balancing test'' originally enunciated by the Supreme Court in *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 112-113 (1956), a case involving an industrial employer's refusal to allow nonemployee union organizers access to its private parking lot. The ''balancing test'' in *Babcock & Wilcox* was extended by the Court in *Hudgens v. NLRB*, 424 U.S. 507 (1976), a case not involving entries by union ''organizers'' to private premises, but entries by employees themselves—warehouse workers engaged in an economic strike who were threatened with arrest for criminal trespass by an agent of a private shopping center owner when they were engaged in peaceful picketing in front of a retail store of their employer located within the shopping center. Holding that ''balancing'' was required in the latter situation as well, the Court stated in *Hudgens* (424 U.S. at 522):

> The *Babcock & Wilcox* opinion established the basic objective under the Act: accommodation of § 7 rights and property rights ''with as little destruction of one as is consistent with the maintenance of the other.'' The locus of that accommodation, however, may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and property rights asserted in any given context. In each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance.

Since *Hudgens*, the Board's approach to cases involving the ''generic situation'' presented here—a general contractor's denial of access sought by a union to a subcontractor's employees on a common construction site where the subcontractor is itself bound to a labor agreement conferring access rights on the union in question—is reasonably settled. The lead case is *Villa Avila*, 253 NLRB 76 (1980), enfd. as modified 673 F.2d 281 (9th Cir. 1982). See also, e.g., *C. E. Wylie Construction Co.*, 295 NLRB 1050 (1989), enfd. as modified 934 F.2d 235 (9th Cir. 1991); *Mayer Group, Inc.* 296 NLRB 25 (1989).

In *Villa Avila*, supra, the administrative law judge, affirmed by the Board, discussed a number of general considerations pertaining to the ''balancing'' of employee rights under Section 7 and the rights of property owners (there, as here, exercised through their surrogates, the general contractors responsible for the construction projects in question).[11]

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[9] Thorpe again admits that he was the one responsible for the decision to deny access to Snyder on November 20.

[10] A further preliminary note: This case was litigated, submitted, and briefed before the Supreme Court issued its recent decision in *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841 (1992). As a consequence, I do not have the benefit of the parties' arguments concerning the possible impact of *Lechmere* on this case. Although I deem it more appropriate for the Board itself to decide in the first instance the extent to which its prior holdings may have been altered by a new opinion from the Court, I cannot avoid the conclusion that *Lechmere* has disturbed the Board's analytical approach expressed in *Jean Country*, 291 NLRB 11 (1988), only as applied to the ''access'' rights to unrepresented employees of nonemployee union ''organizers.'' But this case does not involve denying access to private property of ''union organizers''; rather, it involves a general contractor's denial of access sought by a union to a subcontractor's employees on a common jobsite where the subcontractor is itself bound to a labor agreement conferring access rights on the union in question. And I do not find in Justice Thomas' opinion for the *Lechmere* majority any reason to suppose that the Court intended to significantly alter the way the Board has approached cases of that latter type. Accordingly, I will decide this case within the framework of established, pre-*Lechmere* Board law, just as the parties themselves have submitted it.

[11] In *C. E. Wylie*, supra, the Board noted that the U.S. Navy was the landowner, but, as the VA did in this case, ''the Navy . . . had specifically delegated to Wylie [the general contractor] the right to

Continued

Among other points, the judge addressed the general contractors' arguments that the unions seeking jobsite access had reasonable alternative means to make contact with employees other than talking to them on the jobsite, e.g., at ''curbside'' or at the ''union hall'' or ''by telephone.'' Rejecting this, the judge stated:

> the inefficiency of such methods is abundantly apparent, particularly in the construction industry which customarily requires the frequent movement of employees, materials, and machinery, from one job to another, on an intermittent and irregular basis, and under circumstances requiring varying conditions of safety, changes in the assignment and coordination of work among various crafts, and the continual hiring and laying off of employees. To preclude or severely restrict union-representative access to the jobsite would significantly impair a business agent's ability to insure that significant subcontractors are adhering to their contractual commitments, and to the extent that such policing of the contract is impaired, so are employees' Section 7 rights diminished.[12]

Thus finding a substantial Section 7 interest in permitting jobsite access by union agents to unionized subcontractors' employees, the judge assessed the relative strength of the general contractors' own ''property'' interests, concluding that the latter interests were outweighed by the former. In reaching that conclusion the judge found it especially significant that the general contractor had ''invited'' subcontractors to the jobsite who themselves were bound to union contracts containing ''access'' provisions. Thus, without suggesting that the general contractors were themselves bound to the labor agreements between the subcontractors and the unions in question, the judge observed (id. at 81) that the general contractors' suggested ''extra-contractual restraints on union business representatives . . . would have the effect of . . . nullifying and rendering meaningless the very important provisions of the collective-bargaining agreements which do not so restrict union representatives' access to unit employees, and their employers, on construction sites.'' More fundamentally, the judge reasoned (253 NLRB at 81):

> Respondents, by hiring subcontractors to perform work on the jobsites, have thereby invited these subcontractors to, in effect, maintain a temporary place of business on the site, at which locus the working conditions of the subcontractors' employees are necessarily established. It may therefore be reasonably inferred that Respondents, by hiring such subcontractors, thereby ''necessarily submitted their own property rights to whatever activity, lawful and protected by the Act,'' might be engaged in by union business agents in the performance of their duties *vis-a-vis* these subcontractors who have contractually granted union business agents unrestricted access to the site. See *Scott Hudgens*, 230 NLRB 441, supra.

This latter passage, ''inferr[ing]'' a ''submi[ssion]'' of the general contractor's property rights to the access rights which its subcontractors have ceded in their own labor agreements to union agents, has been the ratio decidendi of the Board's more recent decisions in cases involving situations like those presented in Villa Avila. Thus, in *C. E. Wylie*, supra, the Board stated (added emphasis):

> as recognized in *Villa Avila*, the Respondent's interest in this property right is *diminished* to the extent that it admitted to this site certain unionized subcontractors whose . . . agreements with the . . . Unions included specific provisions allowing access to jobsites.
>
> . . . .
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> As noted by the judge, these contractual access provisions lend further support to the General Counsel's claim that the Unions' attempts to gain access to the . . . jobsites entailed the exercise of strong Section 7 rights.

And in *Mayer Group*, supra, the Board echoed this view, stating (id. at 25, added emphasis),

> as stated in *Villa Avila*, a general contractor's property right is *reduced* when it invites unionized subcontractors onto its property where those subcontractors have collective bargaining agreements that include access provisions.

B. *The Law as Applied to the Respondent's Conduct Vis-a-Vis the Union*

The facts found to this point, linked to the *Villa Avila* line of cases, establish a strong prima facie basis for sustaining the complaint insofar as it alleges that the Respondent violated Section 8(a)(1) when it denied the Union access to the site on the two dates in question. It is a significant factor favoring the General Counsel's complaint here, if not a dispositive one, that the Respondent, by ''inviting'' Total onto the jobsite, and by delegating to Total the right to ''invite'' MacDonald onto the site, has ''submitted'' its own property rights (more precisely, those of the VA) to the Union's ''access'' rights established by the ''local Agreement'' which governs the ''working conditions'' of MacDonald's employees on the jobsite. Thus, the Respondent's abstract property rights have been ''reduced'' or ''diminished'' by these facts alone.

I note that the Respondent, presumably acting in the VA's interests, also compromised the property claim it now seeks to defend by the provisions in its own subcontracting agreements, quoted earlier, wherein it required its subcontractors, inter alia, to ''fully abide by all labor agreements . . . presently in force or subsequently executed with or by the Subcontractor,'' on penalty of being held in ''material breach'' of their subcontracting agreements. These provisions strongly imply that the Respondent operated under a duty to the VA to take all steps necessary to prevent labor disputes on the Project from arising or festering, including but not limited to those arising from breaches of labor agreements. Accordingly, the Respondent's property interest was further ''diminished,'' or ''reduced,'' by the ''labor peace'' requirements it

exclude others from the construction jobsite.'' The Board thereby implicitly equated the general contractor's rights with those of the actual landowner. Id. at 1050. See also *Mayer Group*, supra at 25.

[12] 253 NLRB at 81.

held out as a material consideration in the granting of its subcontracts to unionized subcontractors.[13]

The Respondent argues that *other* considerations outweigh or override the ones just discussed clearly supporting the striking of a balance in favor of the Union's access.[14] I start with Project Manager Thorpe's explanation of the ''background'': Thorpe testified that the Respondent had been previously ''harassed'' in various ways by various building trades unions. Specifically, he referred to ''picketing'' directed against the Respondent, which began on or about April 12, initially conducted both at a gate designated for ''CDK'' and at a gate designated for ''neutrals.''[15] Thorpe admitted, however, that he was unaware of any participation in such picketing by any agents or members of the Union. He admitted also that ''neutral'' gate picketing subsided after ''three or four days,'' after the Respondent filed charges on April 12, apparently alleging Section 8(b)(4)(B) violations.[16] Clearly, the only arguably unlawful picketing described by Thorpe, if any, was brief, was not shown to have been attended by onsite disruptions of work, much less violence or sabotage, and, as of October 15, was relatively ancient history.

Thorpe also generally described incidents—never identifying dates or time periods involved—in which pickets had ''followed our pickup trucks off the jobsite,'' and, in one instance, had followed one of the Respondent's superintendents to his home and then had picketed in the vicinity. Again, the Union was not implicated in such actions, and, from Thorpe's summary descriptions, there is no basis in any case for supposing that such activity constituted anything other than lawful ambulatory picketing in furtherance of a primary labor dispute. With equal vagueness as to timing, Thorpe described ''harassment'' from ''various BAs . . . calling the VA and making unproven allegations of use of foreign materials and the likes . . . .''[17] Similarly, Thorpe claimed that (unidentified) ''union officials'' have made calls to the VA during concrete pours alleging that the delivery trucks had delayed so long before pouring that the concrete had overcured and would no longer meet contract specifications. Again, with respect to the latter incidents, the Union was in no way shown to be implicated; moreover, Thorpe's information about such alleged harassment was necessarily based on hearsay from VA officials, who were not themselves called to testify.

It was against this background that Thorpe explained his more specific reasons for denying access to the Union on October 15 and November 20. Editing out certain digressions, this is what he said about October 15:

> First off, I have no contractual arrangement with any of these union representatives who appeared at our gate. . . . Second off, these officials or union officials had harassed my project since March [sic] and were continuing to harass it. . . . I thought it was rather ridiculous that I was being harassed by nine business agents who had never appeared there before, suddenly appearing on one day . . . to check my site and . . . to visit the people. . . . And also, I have the overall insurance liability . . . . It is my insurance policy . . . [and] I don't want to take the liability of a business agent falling from a building or injuring himself in any way.[18]

Concerning his refusal again on November 20 to permit the Union's Snyder to enter the site alone, Thorpe said: ''For the very same reasons. I have no relationship with Mr. Snyder or with MacDonald-Miller, whom he represents.''

Retranslating and summarizing Thorpe's explanations, the Respondent's counsel argues on brief:

> CDK denied access to Snyder and the others because the unions had harassed his [sic] project since March and were continuing to do so; it had no labor agreement with any of the unions involved and because if [sic] could be liable if any of the visitors were injured on the jobsite.[19] Additionally, the incident on October 15

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[13] In any case the Respondent offered no evidence that the VA had instructed it to deny access or otherwise to interfere with union representatives' attempts to conduct jobsite visits with employees of unionized subcontractors.

[14] The Respondent asserts (Br. 10) that ''No violation of the Act occurred[,]'' and thus invites me to find, on ''balance,'' that it was entitled fully to deny to the Union's Snyder any onsite contact with MacDonald's employees on both October 15 and November 20. But the Respondent also takes the ''Alternate Position'' (Br. at p. 10) concerning the scope of any remedial order I might recommend if I find that a violation occurred. I will discuss the latter questions in the Remedy section. Here, I deal only with the merits of the former question.

[15] According to photographs identified by Thorpe which were taken on April 12, one picket sign used at that time stated:

> CDK IS UNFAIR[.] HE IS UNDERMINING THE STANDARDS OF THIS COMMUNITY by PAYING SUBSTANDARD FRINGE BENEFITS[,] IMPORTING WORKERS[.] THIS PICKET IS PROVIDED BY [overwritten by ''SANCTIONED''] THE COLUMBIA PACIFIC BUILDING TRADES COUNCIL, AFL–CIO

Another photograph shows another picket sign used on the same date containing the legend:

> CDK DOES NOT HAVE A CONTRACT WITH THE LOCAL BUILDING TRADES

Yet another photograph of another picket sign used the same day shows a sign with the legend:

> C.D.K. DOES NOT HAVE A CONTRACT WITH 5 CRAFTS [listing] CARPENTERS[,] CEMENT MASONS[,] ENGINEERS[,] LABORERS[,] TEAMSTERS[.] SANCTIONED

[16] The record does not disclose that the Union was a target of any such charges. The parties stipulated that the Respondent withdrew these charges after ''neutral'' gate picketing ceased. Thorpe further testified that the Respondent filed a second charge on May 6 (apparently because the picketing continued to be conducted ''outside'' the Project entrances even though the Respondent in the meantime had reestablished the ''two-gate'' system within the perimeter of the Project, seeking to avoid traffic tieups and other disruptions occasioned by the picketing at the original, ''outside'' gate(s). Again it does not appear that the Union was targeted by these charges. Again, the parties stipulated that the Respondent withdrew these charges once the picketing was conducted at the reestablished gates within the perimeter fence.

[17] The VA Project operates under ''Buy-America'' material purchasing rules, according to Thorpe.

[18] On rebuttal, Snyder testified that the Union carried its own insurance policy on Snyder and its other agents, which would have covered any expenses associated with any such mishaps as described by Thorpe.

[19] In counsel's footnote to this passage, he responds to Snyder's rebuttal [footnote, supra] as follows:

Continued

> involved an attempt by nine unions, many of which did not have members working at the site, to visit the site simultaneously. [Tr. citation omitted.] The ''mass visit'' on October 15 would have been disruptive and constituted further harassment of CDK.

I am not persuaded. Indeed, I view these various explanations and claims as largely pretextuous, invoked to mask a more fundamental wish on the Respondent's part simply to prevent the Charging Party Union (and unions, generally) from having any significant ''presence'' on the Project, or influence over the terms and conditions under which any unionized employees might perform their work on the Project.

To begin with, it completely ignores the *Villa Avila* rationale to suppose that the Respondent's lack of a ''labor agreement'' directly with the Union would excuse barring the Union from the site, under circumstances where the Respondent had ''invited'' subcontractors to the job who did have labor agreements with the Union containing access provisions. This argument is therefore largely irrelevant.

Regarding the alleged ''background of harassment,'' it suffices to observe that Thorpe never identified any reasonable basis for holding the Union responsible for the alleged prior ''harassment,'' which in any case was not shown to have involved any plainly unlawful activity by any particular union or combination of unions. Thus, the Union's claims of a right of access was not ''reduced'' simply because of this background.[20] Moreover, it is impossible to accept that Snyder's presence on October 15 *in the company* of agents of unions which may have been more directly involved in the previous alleged ''harassment'' played any significant role in Thorpe's decision to bar access to Snyder. This is because Thorpe had admittedly issued instructions to Total earlier that morning to bar Snyder from his preannounced planned visit to the site even before Thorpe became aware of Snyder's presence in the company of agents from other unions.

It is speculative, moreover, for the Respondent's counsel to suggest that the '''mass visit' on October 15 would have been disruptive.'' Because of the Respondent's blanket refusal to permit jobsite access by *any* union agents, we will never know what would have happened if access to some or all of them had been granted.[21] Moreover, if such a feared ''disruption-by-mass-visit'' accounted for Thorpe's decision to deny access to Snyder on October 15, one may reasonably question why it was that the Respondent *again* denied access to Snyder when Snyder appeared *alone* on November 20.

I further find pretext in Thorpe's claim that he was concerned about ''insurance liability'' if he were to permit Snyder or any other union agent to enter within the fenced jobsite. Wholly apart from the fact that the Union apparently had its own insurance covering Snyder's visits to construction sites, I recall [footnoot, supra] that such alleged ''liability'' concerns had not prevented Thorpe from admittedly inviting certain unions to conduct picketing within the confines of the perimeter fence months earlier, when Thorpe then had found it in the Respondent's interest to have such picketing conducted ''inside,'' rather than at the outside ''main entrance'' where they had posted themselves until on or about May 6.

Two other claims are inconclusively advanced by Thorpe and/or the the Respondent's counsel: First, Thorpe states he was not personally aware of the ''access'' provisions in the Union's contracts with (or otherwise binding on) MacDonald (or McBride, or DeaMore), because he had never asked for those contracts and had never been furnished with copies. A similar defensive claim was rejected in *C. E. Wylie*, supra, on ''constructive notice'' grounds, where, as here, ''[the respondent] knew the subcontractors were unionized and should have known of the contractual rights of the subcontractors' employees.''[22] Second, the Respondent suggests that it was adequate to Snyder's visitational purpose on both October 15 and November 20 that the Respondent permitted MacDonald's job foreman, Ward, to leave the site and talk with Snyder outside the perimeter gate. Such ''alternative access'' contentions have been repeatedly rejected by the Board, essentially for the reasons stated by the judge in Villa Avila, quoted earlier.[23]

Accordingly, I reach this conclusion of law: When, on October 15 and November 20, the Respondent refused to permit the Union's business representative, John Snyder, to enter the VA Project jobsite to meet with employees of MacDonald, the Respondent interfered with, restrained, and coerced employees in the exercise of the rights guaranteed them by Section 7 of the Act, and by its admitted continuing refusal to permit such access, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

C. *Other Claims of the General Counsel Arguably Going to the ''Merits''*

I turn now to certain lingering claims of the General Counsel, grounded in the complaint, which might be superfluous were it not for the General Counsel's (and the Respondent's) arguments with respect to the appropriate remedy here.

1. On behalf of ''other unions''

As I noted at the outset, the complaint alleges that the Respondent violated Section 8(a)(1) *on October 15* not only by denying jobsite access to the Union's representative, Snyder, but also by denying access to representatives of ''other unions representing employees on the jobsite.'' The General Counsel presented no evidence that on October 15 any ''employees . . . on the jobsite'' were ''represent[ed]'' by any of said ''other unions.'' Moreover, she offered no evidence concerning the existence or nature of any contractual relationship those ''other unions'' might have had with any subcontrac-

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The fact that Mr. Snyder is covered by workers compensation insurance from the Sheet Metal Workers would not prevent him from suing CDK.

[20] And see *Villa Avila*, supra, 253 NLRB at 82, finding an 8(a)(1) violation in the eviction of Cement Masons Agent Nieto from the jobsite on two occasions during concrete pours involving a concrete supplier with whom the Cement Masons had a labor agreement containing ''access'' provisions, and where, ''so far as the record shows, Cement Masons . . . had not theretofore engaged in unlawful secondary activity at this site[, and u]nder these circumstances it is reasonable to assume that Nieto had a legitimate reason to be on the job.''

[21] And see *Mayer Group*, supra, 296 NLRB 25 fn. 4 (1989), where the Board dismissed a similar argument.

[22] 295 NLRB 1050.

[23] See also, *C. E. Wylie*, supra; *Mayer Group*, supra.

tors employing employees on the jobsite on October 15.[24] Thus, the record is overall too scanty to enable a determination that the Respondent's actions vis-a-vis those ''other unions'' involved any violations of the Act, and I will therefore recommend dismissal of the complaint in this limited respect.

2. The (already dismissed) complaint counts alleging that the Respondent and Total are ''bound'' to the access provisions in the Columbia SMACNA Agreement; the General Counsel's request that I reverse this dismissal

On this record, there is no legal basis for claiming that either the Respondent or its principal mechanical subcontractor, Total, are themselves ''bound'' to the visitation provisions in the ''local Agreement,'' i.e., the Columbia SMACNA Agreement, which bind MacDonald (and other subcontractors, such as McBride and DeaMore). The point needs to be emphasized only because both the original and the amended complaints (at pars. 4(c) and (d)) literally allege to the contrary, and the General Counsel continues to argue in favor of those counts on brief, even though I dismissed those counts as a matter of law at the conclusion of the General Counsel's case-in-chief. Indeed, on brief, the General Counsel requests that I ''reverse [my] ruling granting Respondent's Motion to Dismiss these two paragraphs.'' I decline to do so.

This is the relevant background: Pertinently, paragraph 4 of the amended complaint alleges:

> (c) By virtue of the [collective-bargaining] contract with MacDonald-Miller . . . Total Mechanical, Inc. became bound to the [''visitation''] provision in the Columbia SMACNA agreement.
>
> (d) By virtue of the [subcontracting] contracts between Respondent . . . and McBride, DeaMore, and Total Mechanical . . . Respondent . . . became bound to the visitation clause in the Columbia SMACNA Agreement . . . .

I first questioned the General Counsel's position concerning the allegations in paragraphs 4(c) and (d) during opening colloquy, asking how it could be that either the Respondent or its principal mechanical systems subcontractor, Total, could be ''bound'' to any labor agreements that the other named subcontractors (MacDonald, McBride, and DeaMore) might have with the Union. At that point, counsel for the General Counsel conceded vaguely that the complaint ''is perhaps overstated in that area,'' but she declined to withdraw those counts at that time, pending consultation with her superiors. At the conclusion of her case-in-chief, following such consultations, she again declined to withdraw those counts, stating that, ''basically my instructions are just to leave it [i.e., pars. 4(c) and (d) of the complaint] in.'' In support, she relied on the now-familiar passage from *Villa Avila*, quoted earlier.[25] Unpersuaded, I granted the Respondent's motion to dismiss those counts, stating on the record that the *Villa Avila* language the General Counsel was relying on in no way supported the notion that a general contractor becomes legally ''bound'' to the ''visitation'' provisions in labor agreements between subcontractors and unions representing the subcontractor's employees simply by ''inviting'' such subcontractors to the site. Rather the language in question suggested only that when a subcontractor invited by the general contractor to the jobsite has a ''visitation'' provision in its own contract with the union representing the subcontractor's employees, this is a factor properly to be considered as part of a ''balancing'' of the general contractor's ''property'' rights against the Section 7 rights of employees to have access to their union representative. And, as I explain below, my construction of *Villa Avila* on this point appears to be fully supported by the Board's comments in *C. E. Wylie*, supra at fn. 3.

Arguing for ''revers[al]'' of my dismissal of paragraphs 4(c) and (d) in a footnote to her brief (at 11, fn. 2), the General Counsel confines herself to a single explanatory sentence (added emphasis):

> Paragraphs 4(c) and (d) in the Complaint describe the end results of the balancing test—that CDK must grant access the same *as if they* [sic] *had been bound* to the access clause.

I am unpersuaded by this reformulation. First, it is clear that the General Counsel, under the pretense of ''clarifying'' the counts in question, has in fact amended them, *sub silentio*,[26] and under the guise of seeking a ''revers[al]'' of my trial ruling, the General Counsel is really asking me to rule on a different set of allegations than the ones I dismissed.[27] But even if the complaint had plainly stated such an ''as if'' theory, I would have ruled no differently. For it appears that the General Counsel has merely used new words to advance essentially the same underlying claim—that the access provisions in the Columbia SMACNA Agreement somehow define and fully delimit the scope of the Respondent's own rights to control access to the VA Project, and to that extent, those access provisions ''bind'' the Respondent. But I see no warrant in *Villa Avila* and progeny for the notion that the Respondent and/or Total may be treated ''as if'' they were ''bound'' to the ''access clause'' in the Columbia SMACNA Agreement. The simple legal fact is that they are not ''bound'' to any such ''access clause.'' Neither was the ''access clause'' in the subcontractors' labor agreements treated by the Board as the touchstone by which to define the scope and extent of the the general contractors' rights of

[24] Indeed, the General Counsel has never specifically identified which ''other unions'' the complaint might be referring to, and, on brief, she does not specifically argue the merits of, or otherwise address the claim on behalf of ''other unions,'' except in summary remedial prayer (Br. 12), which I do not adopt for reasons I explain in the remedy section, infra.

[25] ''It may therefore be reasonably inferred that Respondents, by hiring such subcontractors, thereby 'necessarily submitted their own property rights to whatever activity, lawful and protected by the Act,' might be engaged in by union business agents in the performance of their duties vis-a-vis these subcontractors who have contractually granted union business agents unrestricted access to the site.''

[26] Pars. 4(c) and (d) did not ''describe'' any ''end result'' of a ''balancing'' test; they alleged a contractual relationship between the Respondent and Total, on the one hand, and the Union, on the other.

[27] At the trial, I dismissed counts which unqualifiedly alleged that the Respondent and Total were ''bound'' to ''the access clause'' in the Columbia SMACNA Agreement. I never ruled on any such revised, ''as if'' theory.

limiting access to the jobsites in *Villa Avila*, or its progeny. The Board could not have made this more clear when it said in *C.E. Wylie*, supra at footnote 3 (added emphasis):

> The contracts giving the Unions access are *not* with the Respondent but, [sic] with its subcontractors. *Thus*, standing alone, *the contracts are not dispositive of the issues* . . . . The same conclusion holds true with respect to the issues posed in *Villa Avila*. . . . Thus, in *Villa Avila*, the *significance of the contracts* was the *enhancement* their access provisions imparted to the Section 7 rights involved in weighing those rights against the respondents' property rights.

Accordingly, I adhere to my dismissal of complaint paragraphs 4(c) and (d), including insofar as the General Counsel contends that the Respondent or Total may be treated ''as if'' they were ''bound'' to the access provisions of the Columbia SMACNA Agreement.

THE REMEDY

This is the General Counsel's remedial prayer (added emphasis):

> Accordingly, it is urged that the Administrative Law Judge issue an order requiring Respondent to cease and desist from denying access to Local 16, *and other unions* representing employees on Respondent's jobsite, when access is sought for *legitimate union business, including*, but not limited to, *safety inspections*.

This is the Respondent's ''alternate position'' with respect to any remedial order, should I find that it violated the Act:

> (1) Access should be allowed only union agents having contracts with subcontractors who are present and working at the jobsite.
>
> (2) [The Respondent] should be allowed to promulgate reasonable rules concerning access to the jobsite.
>
> (3) All visitors should be required to check in with [the Respondent] and state the purpose of their visit.
>
> (4) [The Respondent] should be allowed to provide an escort for any visitor to the project . . . .

Largely for reasons I have already discussed, I cannot fully embrace either of the parties' positions as to remedy, but I recognize both parties' common need, implicit in the specifics of each party's remedial suggestions, for an order of sufficient specificity to provide the Union and the Respondent with practical guidance in their future conduct, and to provide the General Counsel's office with a practical means for measuring the lawfulness of any future conduct by the Respondent which may be challenged as a violation of the order.

First, as to the ''other unions'' language sought by the General Counsel, I will not include such a provision, where this litigation permits me to find only that, on balance, in the unique circumstances shown to exist in this case, the Charging Party Union's rights[28] to access to MacDonald's employees outweighed the Respondent's claimed property rights.[29] But as I explain further below, my Order will prevent the Respondent from in any ''like or related manner'' interfering with, restraining, or coercing ''employees'' in the exercise of their Section 7 rights, and this language is adequate to measure the lawfulness of any future conduct of the Respondent is alleged to violate the Order.

Second, I note that the General Counsel seeks an Order requiring the Respondent to grant union access to the ''jobsite'' (presumably limited to the VA Project, which is how I construe it)[30] for any ''legitimate union business.'' I am not disposed to couch the Order in such terms because such language is potentially overbroad, in that it conceivably applies to situations where a quite different ''balance'' might be struck. For example, it cannot be gainsaid that it is ''legitimate union business'' for a union to attempt to make ''organizing'' contacts with currently unrepresented groups of employees, but, in the light of the Court's recent holding in *Lechmere*, supra, it is arguably unlikely, except in the case of ''remote'' jobsites, that the Section 7 interests of such unrepresented employees in having jobsite contacts with a union agent would be held to outweigh the jobsite owner's property interest in preventing nonemployees from entering the jobsite. Thus, my Order limits itself to situations in which the Union seeks access to employees the Union currently represents.

A separate question lurks in the General Counsel's proposed order, even if it were construed as being limited to situations where the union currently represents the employees to whom it seeks access. Implicitly, the General Counsel's proposed Order would not confine itself to situations where, as here, the employees to whom the Union seeks access are working under a labor agreement which grants the Union the right of access to them on the jobsite. This raises the question whether such access provisions in a subcontractor's labor agreement are a *sine qua non* to a finding of a violation here or in other cases of this type. It is arguable that the *Villa Avila* line of cases turned in each case on the existence of such access provisions in subcontractors' labor agreements with the union seeking access. And my attention has been called to no cases in which, absent such contractual access provisions, the Board has found a statutory right of access. But the Ninth Circuit's enforcing opinion in *C. E. Wylie*, supra, construed at least the *Wylie* holding more broadly, noting that the Board's *Wylie* decision ''did not accord 'decisive weight' to the CBA provisions requiring jobsite access,'' and finding it ''probable that in rejecting Wylie's proposed limitation, the NLRB implicitly decided that in future cases involving the absence of access provisions the balance would *still tip in favor of the unions*.'' 934 F.2d at 239 (added emphasis). Accordingly, the Ninth Circuit rejected Wylie's appeal insofar as it sought a narrower order,

[28] Here and in all other cases where I have spoken of a union's ''rights'' to access, I recognize that the the ''rights'' in question are ''derivative,'' i.e., that they really trace or derive from the rights of employees under Sec. 7 of the Act.

[29] See, in this respect, the Ninth Circuit's critical comments (934 F.2d at 236-238) with respect to the Board's ''or any other labor organization'' provision in its remedial order in *C.E. Wylie*, supra.

[30] I observe in this regard that the General Counsel has not made any record which would permit a finding that the Respondent is likely to commit similar violations at other jobsites at which it might in the future be the general contractor. And see *NLRB v. C. E. Wylie Construction Co*., supra, 934 F.2d at 238.

confined only to situations involving right of access provisions in a subcontractor's labor agreement. Ibid. The Ninth Circuit's construction of the Board's *Wylie* holding is entitled to deference, even if I were otherwise inclined to view it as being more narrowly limited to situations involving access provisions in a subcontractor's labor agreement.[31] Accordingly, my order does not confine itself to situations of the latter type.''

Finally, as to the General Counsel's remedial prayer, my Order will include a conventional provision requiring the Respondent to cease and desist from any ''like or related conduct'' which tends to interfere with, restrain, or coerce ''employees'' (without restriction as to trade or craft or identity of their employer) in the exercise of Section 7 rights. And I think this not only adequately addresses the violation herein but adequately addresses as well the General Counsel's legitimate concern that the Respondent be prevented from taking actions in *similar* situations involving ''other unions,'' without suggesting that the ''other unions'' herein enjoyed the same standing as the Charging Party Union was shown to occupy.

As to the Respondent's own proposed remedy, I believe that my Order is likewise adequately responsive to the Respondent's legitimate ''property'' protection interests. It requires the Respondent to grant jobsite access to the Union to employees it represents, but I specifically provide that this Order be understood as being without prejudice to the Respondent's right to impose ''reasonable'' and ''nondiscriminatory'' conditions pertaining to nonemployee access generally, so long as they are consistent with the conditions, ''if any,'' which it had maintained in effect before October 15 pertaining to such nonemployee access, and so long as those conditions do not operate to bar union access to represented employees whose terms and conditions of employment by a subcontractor include the right of such union access on the subcontractor's jobsite.

Except as just noted, however, I decline to authorize the Respondent to impose the specific conditions on access it has set forth on brief. It would be at least premature to permit the Respondent to impose such suggested ''rules,'' given the absence of any clear proof in this record concerning what, if any, conditions the Respondent may have imposed on nonemployee jobsite access before October 15. If its only ''rules'' before October 15 simply required nonemployee ''visitors'' to the site to ''sign-in'' at the guard shack at the main gate and to identify which subcontractor or employees the visitor intended to visit with, then clearly it would involve impermissible discrimination for the Respondent now to engraft ''special'' rules for access by union officials. Moreover, I am especially disinclined to authorize the Respondent to impose an ''escort'' requirement on ''visits'' by union representatives, even if, prior to October 15, the Respondent may have generally required visitors to enter only with such an ''escort.'' This is because it would plainly intrude on the free exercise of Section 7 rights to permit the Respondent to have an agent follow and monitor a union representative's communications with employees. Where intrusion on Section 7 rights is thus manifest, the intrusion cannot be justified except on a special showing that it is necessary to the vindication of the Respondent's (or the VA's) legitimate property interests; and the Respondent made no such special showing here.[32]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[33]

ORDER

The Respondent, CDK Contracting Company, a subsidiary of FK Group, Inc., Vancouver, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to permit the Sheetmetal Workers International Association, Local Union No. 16, AFL-CIO to enter its VA Project jobsite for the purpose of communicating with employees of subcontractors whom it currently represents.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of Section 7 rights.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On the Union's request, permit it to enter the VA Project jobsite to communicate with employees it currently represents; provided, however, that nothing here shall be construed as preventing the Respondent from applying any reasonable and nondiscriminatory conditions pertaining to nonemployee access generally which the Respondent may have applied before October 15, 1991; provided further, however, that the Respondent may not require the Union to be accompanied by a Respondent-designated ''escort,'' during any such communications with employees it currently represents.

(b) Post at its VA Project offices in Vancouver, Washington, and at any other locations on the VA Project jobsite where employees represented by the Union are currently

[31] It is true that in *Villa Avila* and progeny, a variety of elements favoring access were recited which were arguably independent of the existence of access provisions in labor agreements between the subcontractors and the unions seeking access. (E.g., the ''general'' reasons invoked by the judge in *Villa Avila*, quoted supra, concerning the vagaries of the construction industry, and the constantly shifting ''safety'' and other conditions under which employees labor, and the obstacles to effective union representation of construction workers and to the unions' ''policing'' of labor agreements if the unions are not permitted to enter jobsites where those workers are employed. But as I have earlier noted, *Villa Avila* and progeny all have in *common* that they place great emphasis on the ''infer[ence]'' of ''submi[ssion]'' of the general contractors' property rights to be drawn where, as in all those cases, the general contractor had ''invited'' unionized subcontractors onto the jobsite who themselves were bound to union contracts containing access provisions. And this supports the inference that such access provisions were, indeed, a *sine qua non* to the striking of the balance in favor of union access in each of those cases. But where this case arises in the ninth judicial circuit, and the Ninth Circuit has construed the Board's holding more broadly, and the Board has not to my knowledge disavowed the Ninth Circuit's broader view, I believe it more appropriate to follow the Circuit's reasoning, unless and until the Board clearly holds otherwise.

[32] See, in this regard, *C. E. Wylie*, supra at fn. 2.; *Mayer Group*, supra at fn. 5.

[33] If no exceptions are filed as provided by Sec. l02.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. l02.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

working, copies of the attached notice marked ''Appendix.''[34] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by Macdonald-Miller, Inc., DeaMore Associates, Inc., and McBride Sheet Metal, Inc., if willing, at all places where notices to employees are customarily posted.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[34] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''